71-1623

FILED
JUN 14 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO.

BOB BULLOCK, SECRETARY OF STATE OF TEXAS,

Appellant

v.

DAN WEISER, DONALD COLEMAN, JOHN L. EDWARDS, HUGH ELLIOTT, JOHN W. FLETCHER, JOHN R. KARR, JOYCE V. KARR, BENJAMIN NEWCOMB, NORMA PALMER, AND MARVIN ZIMET,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

JURISDICTIONAL STATEMENT

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PONSE NOT PRINTED

June 1972

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered on January 22, 1972, enjoining appellant from taking steps toward the conduct of an election of Members of Congress under the districting plan set up by the Texas Legislature, and ordering into effect, in its stead, a districting Plan adopted by the District Court. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial federal questions are presented.

OPINION BELOW

The opinion and orders of the District Court for the Northern District of Texas are not yet reported. The opinion and orders are attached hereto as Appendix A. The order of this Court staying the said judgment, on application by appellant to Mr. Justice Powell, by him referred to the Court, is reported at — U.S. —, 92 S. Ct. 750 (January 27, 1972). This Court's denial of the motions of appellees to advance and expedite and to dispense with printing is reported at — U. S. —, 92 S. Ct. 928 (February 22, 1972).

JURISDICTION

The action below was brought to enjoin the enforcement of a statute of the State of Texas, Senate Bill One, Tex. Acts, 62d Leg., 1st C. S. 1971, ch. 12, p. 38, and jurisdiction of the three-judge District Court below was invoked under Title 28 of the United States Code, Sections 1343 and 2281. The jurisdiction of this Court to review on appeal the judgment of the District Court is founded on 28 United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the Congressional districting plan adopted by the Texas Legislature was a permissible one within the standards hitherto set by this Court, and hence whether the action of the court below, in overturning the legislative plan, properly interpreted those standards.

2. Whether the standards for Congressional districting hitherto set or adumbrated by the decisions of this Court, particularly in the case of *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), ought to be reconsidered and revised.

3. Whether the court below (even assuming a negative answer to each of the above questions) acted improperly and without warrant of law in ordering into effect the districting plan it incorporated into its opinion "as the plan of this Court for the congressional districts of the State of Texas . . ."

STATUTE INVOLVED

The statute involved is Senate Bill One, Tex. Acts, 62d Leg., 1st C. S., 1971, ch. 12, p. 38, a copy of which, with map and table of variations, is attached hereto as Appendix B.

STATEMENT

On June 17, 1971, the Governor of Texas signed into law Senate Bill One (Tex. Acts, 62d Leg., 1st C. S., ch. 12, p. 38, hereinafter referred to as S.B.1) a measure dividing the State of Texas into twenty-four Congressional Districts for the ensuing decennium. Summarily, this Act allowed population variations (from the 1970 census count) of +2.43% for the 13th District, +2.38% for the 16th District, +2.34% for the 19th District, and —1.7% for the 15th District. None of the other variations are significantly over 1%, ranging rather evenly from +.01% to —1.14%, with the majority of all twenty-four variations, up or down, below .5%.

The widest up-and-down variation is 4.1%, between the 13th and the 15th Districts, putting their 1970 census populations into a ratio of 1:1.041.

On October 19, 1971, plaintiff-appellees (residents of the 6th, 13th, 16th and 19th Districts) filed their complaint against the appellant herein, Secretary of State of Texas and chief election official thereof, alleging violation of their rights under Article I of the Constitution of the United States, and the Equal Pro-

tection Clause of the Fourteenth Amendment. They asked an injunction against holding of any election under S.B.1 and an order directing the Legislature to enact a new bill, and in the event this was not done, that a plan submitted by them and appended to their complaint be ordered into effect, or, in the alternative, that an at-large election be ordered. The plan then submitted is hereinafter referred to as Plan B; a map and table of variations in this Plan are appended hereto as Appendix C.

Appellant's answer in effect denied violation of appellees' rights by S.B.1. A three-judge district court was convened to hear the case. On January 22, 1972, Van Henry Archer, designated in his complaint-in-intervention as "duly elected Chairman of the Bexar County Republican Party," and others, filed a complaint-in-intervention, joining appellees in their general position, but proposing another Plan, containing deviations up to 1.08%

On January 10, 1972, plaintiffs filed an amended complaint, substantially similar to their original complaint, except that another plan, hereinafter referred to as Plan C, was tendered the court as a remedial possibility. A map and variations for Plan C are appended hereto as Appendix D.

This Plan C provided for population variances *greater* than Plan B in 14 Districts, equal to Plan B in 8 Districts, and less than Plan B in only 2 Districts, in one of these by the amount of four persons. The maximum variation of Plan C is almost exactly five times the maximum variation in Plan B. (13th District).

On January 22, 1972, twelve days after the filing of appellees' amended complaint (wherein Plan C was

first presented), the court below, in a three-page *per curiam* opinion, declared S.B.1 unconstitutional, enjoined elections under it, and adopted appellees' Plan C as ". . . the plan of this Court for the congressional districts of the State of Texas. . . ." The court's entire rationale for the adoption of Plan C was that it was "significantly more compact and contiguous than" the other Plans. (All Districts in all the Plans are actually contiguous.)

The District Court's decree provided for reconsideration if the Legislature devised a new plan, but the Governor refused to call a special session.

This Court granted a stay of this judgment, on January 27, 1972. (See 92 S. Ct. 750.)

There are no "findings of fact" in the opinion of the court below. Evidence taken in the cause consisted in depositions of several legislative members, two clerks, and the Lieutenant Governor, concerning the process leading to the passage of S.B.1. In the absence of "findings of fact" to which specific comment might be addressed, the upshot of this testimony is difficult to summarize without argumentativeness: appellant finds in it no probative evidence of impropriety or bad faith, and must necessarily leave to appellees the pointing-out of such evidence, if in their view it exists. (The negative answer to the "good-faith" question in the deposition of Oscar Mauzy was preceded by a long philosophic discussion of the meaning of the term, a discussion which appellees' counsel himself said "confused the record hopelessly," and in any case was an answer to a question which mixed population equality with compactness and contiguity—*not* constitutional requirements. Mauzy Deposition, pp. 74-77. This parenthesis may perhaps serve to illustrate why full analysis

of this Record is inappropriate at this time.) It is fair to say, however, that the testimony does show a concern, on the part of those legislators principally active in the apportionment process, for the maintenance where possible of constituency-Congressman relations and of seniority deemed valuable to the State (see, e.g., Deposition of Senator J. P. Word, pp. 27-29), though appellant finds no distinct evidence of any causal connection between this concern and any of the small variations from population equality in S.B.1; nor is there any evidence that this concern had a partisan bias. (So far as appellant can make out, Senator Word's testimony that no such bias existed stands unimpeached and unrebutted; see Deposition of Senator J. P. Word, p. 28.) There is evidence that some legislators took into account a belief that the relative populousness of West Texas would probably continue to decline (*ib.* p. 37); the three districts showing a disparity of more than 2% are in that section.

There is nothing in the Record bearing in any way on the practicality, prudence or wisdom of any of the Plans submitted as alternatives to S.B.1, including the Plan (Plan C) adopted by the court below.

THE QUESTIONS ARE SUBSTANTIAL

I.

Even a following of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), need not result in condemnation of the Legislature's districting plan now at bar.

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) held on its own facts, that Article I of the Constitution permits, in Congressional districting, ". . . only the limited population variances which are unavoidable despite a *good faith effort* to achieve absolute equality,

or for which justification is shown." 394 U.S. at 531. [Emphasis supplied] While appellant's principal contention will be (II, *infra*) that this standard, as given concreteness by the *Kirkpatrick* facts, is wrong as a matter of substantive law, and that the *Kirkpatrick* position ought accordingly to be receded from by a short distance, appellant nevertheless contends that the instant case, on its own facts, satisfies even the stringent *Kirkpatrick* standard, as the latter should properly be interpreted if it is to stand.

A "good faith" attempt at reaching equality satisfies the *Kirkpatrick* rule as quoted above. The term "good faith" is one of the most Protean in law, changing shape from context to context, and the *Kirkpatrick* opinion does not attempt a general definition in this context. Appellant suggests that "good faith" here must mean such "good faith" as can meaningfully be predicated not of a single individual, working with census blocks and a computer, and with nothing but numbers on his mind, but of three separate political authorities (in Texas, a House of 150 members, a Senate of 31 members, and the Governor) working in a highly intricate and complicated coaction, against time, for compromise amongst many legitimate claims. The rejection of this definition amounts to a rejection in principle of districting by the Legislature, and insures that much districting will have to be done by the courts. Indeed, all of it would have to be performed by the courts, except where by lucky chance the legislative process, in its normal working, produced exact arithmetical equality.

The *Kirkpatrick* opinion (394 U.S. at 531-2) gave definite reasons, derived from the *Kirkpatrick* Record and lower court findings, for concluding that "good faith," in this one and only realistic sense, was absent

in the Missouri process. The most important thing about this recital of reasons is that its being made at all forbids the conclusion that *Kirkpatrick* sets up a *presumption* of "bad faith" in the legislative process on *nothing more* than a showing of any palpable variation from equality; the Court in *Kirkpatrick* felt it needful to point to particulars in the Missouri process which justified rejection of the contention that a good-faith effort had been made. None of these particulars can be asserted of the process followed by Texas in this case, first because there are no "findings of fact" in the judgment here under review, and secondly because the whole testimonial Record paints a picture of an honest attempt to apportion the State properly. Unless, therefore, there is *now* to be erected the above-mentioned presumption of "bad faith" on the part of the Legislature and Governor of a State, on nothing more than a showing of palpable though quite small variation, Senate Bill One must be sustained. even under *Kirkpatrick,* for *Kirkpatrick* itself need not be read to commit this Court to that presumption.

A careful reading of the paragraph in *Kirkpatrick* that is crucial here (394 U.S. 531-2) leaves the impression that great weight lies in the sentence declaring it "simply inconceivable that population disparities of the *magnitude* found in the Missouri plan were unavoidable." (394 U.S. at 532) [Emphasis supplied] The "disparities" in the present case are of a definitely lesser magnitude than those in *Kirkpatrick* (4.1% up and down as opposed to 5.97% up and down); the *Kirkpatrick* variation was thus nearly half again as large as the maximum up-and-down variation here. Only experience with the political process, as worked by men of unimpeached good faith, can show what is "conceivable" within it; it is submitted that the whole

Record in this case illustrates and exhibits that it is entirely "conceivable" that population variations of the magnitude found in Senate Bill One can result, despite good-faith effort within that complicated process of consultation and compromise which is the process necessarily to be followed if districting is to stay in the hands of the Legislatures. Even a bull's-eye has some thickness; a hit toward the edge of it does not imply lack of good-faith effort to hit the center.

If "good faith," in the above sense, be allowed the Legislature, then even under *Kirkpatrick* no "justification" is necessary. However, assuming the necessity of justification, the court below has in one summary sentence rejected all possible justifications, without specifying their nature. The working of the legislative process is such that *official* "justifications" commonly do not emerge from it, and have therefore rarely been looked for with respect to legislation in general. On this Record one might conjecture them (if needed) to be twofold: (1) The anticipation of further lessening in population in West Texas; (2) Attention to the objective of maintaining mutually satisfactory Congressman-constituency relations, and maintenance of the State's accrued Congressional seniority (See, e.g., references to the Word deposition, *supra*), though it must be repeated that this factor is not shown, so far as appellant can make out, to have been causally connected with any deviation. On the whole Record, the worst charge that could possibly be sustained is that these motives may have produced, directly or indirectly, these small deviations.

The full upholding of these "justifications" cannot be undertaken in this Jurisdictional Statement. But appellant submits that their full consideration, as possible "justifications" if these be needed, is requisite,

before this Court affirm so serious an incursion into State political structure as has occurred in this case, on such a trivial and conjectural showing of "debasement" of voting power.

Finally, and generally, the intervening case of *Abate v. Mundt,* 403 U.S. 182 (1971), approving a 12% deviation from equality in a local-government plan, requires consideration of the application to the instant case of that qualification to the *Kirkpatrick* standard stated in *Kirkpatrick* itself:

> "The extent to which equality may practicably be achieved may differ from State to State and from district to district." *Kirkpatrick v. Preisler,* 394 U.S. 526, 530 (1969).

Nor is there any rational ground for the total exclusion of Congressional districting from the never-repudiated caution in *Reynolds v. Sims:*

> "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. *Developing a body of doctrine on a case-by-case basis* appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." *Reynolds v. Sims,* 377 U.S. 533, 578 (1964). [Emphasis supplied]

At a minimum, the State of Texas is entitled to a full examination of these questions (whether as to "good faith" or as to "justification") in this Court, before its carefully considered plan for its own Congressional representation be rejected on mere citation of *Kirkpatrick.*

II.

The strict standard of Kirkpatrick v. Preisler ought to be reconsidered and revised. It will be ap-

pellant's contention that that standard is not warranted by law, and is (as the instant case balefully illustrates) inevitably productive of a highly undesirable involvement of the judiciary in the details of the apportionment process. Appellant will submit that the warrantable substantive law of Congressional apportionment contains a term of reasonable latitude, within which the legislative plan at bar evidently falls, and that this Court might appropriately set up, as a vitally needed remedial convenience, a numerical standard of permissible deviation from equality of census figures.

Appellant's contention here will *not* be that a *de minimis* standard ought to be indulged for dealing with established violation of constitutional rights. It will rather be that, on full reconsideration, the *substantive constitutional law* governing districting for Congress ought to be held to be such that the plaintiff who shows district variations of a few percentage points has not stated or proved any case whatever of violation of his constitutional rights. (This position does not, of course, imply that quite independent constitutional norms, such as the command against racial discrimination, may not in a given case come into play.)

Appellant's contentions here will be, broadly, twofold: (1) The rationale of *Wesberry v. Sanders,* 376 U.S. 1 (1964), the leading and rationally definitory case on the subject of Congressional districting, reaches to support of a doctrine of approximate and reasonable equality, but not to support of a doctrine of close arithmetical equality; and (2) that the nature of the census figures, upon which alone the doctrine of close arithmetical equality can operate, for multiple reasons makes that doctrine meaningless as a protection against *dilution or debasement of the vote,* the evil

sought to be prevented in the apportionment decisions. It cannot be that good law commands an idle thing, unrelated to the value sought.

The judgment in *Wesberry v. Sanders, supra,* rests squarely and exclusively upon the wording and history of Article I of the Constitution of the United States. The history adduced in the opinion consists exclusively of utterances contemporaneous with the adoption of that Article.

It may legitimately be questioned, with great respect, whether the Court did not on that occasion make a somewhat simpler thing of the implications of the adduced history than was warranted. It is very clear, for example, that the Convention never fully decided whether it was using population, as such and on its own merits, as a basis for apportionment, or whether, on the other hand, it was using population as a parameter for estimating the respective wealth of the States, conceived by some to be the proper measure of representation. See, e.g., II Farrand, RECORDS 541-542 (rev. ed. 1937); see also THE FEDERALIST No. 54. Even an early draft of the Committee of Style tied population to "direct taxation," and only by cross-reference to representation. II Farrand, *ib.*, 565 *et seq.* The drawing on London and Old Sarum as illustrative of the evil sought to be prevented by proportionate representation indicates focus of attention on differences of a very high order of magnitude, rather than on exact equality; see *Wesberry v. Sanders,* 376 U.S. at 14-15. Leaving to the several States the power to fix voting qualifications, which varied enormously (see Chute, THE FIRST LIBERTY (1969), *passim*) and inclusion of three-fifths of the voteless and voiceless slaves in the population base (a necessary compromise) perhaps combine with the foregoing considerations to suggest that it is not

the earliest history alone, but the whole constitutional history of the United States (including the Thirteenth and Fifteenth Amendments, Section Two of the Fourteenth Amendment, the development of universal suffrage and less easily defined changes in attitude) to which recourse must be had to establish approximate equality of congressional districts as a warrantable principle of the structure of the national government, inviolable by the States. Nevertheless, appellant completely accepts this principle. The point here made is that this approximation to equality, *not* an absolute arithmetical equality, is all that can be warranted by the history adduced in *Wesberry v. Sanders,* and all, therefore, that the theory of that leading case ought to have been held to require—and that there is no other history, and no consideration relevant to law, conducing to the establishment of the strict requirement of *Kirkpatrick.*

Plainly, the center of gravity of the discussion of equal representation, in the Constitutional Convention, was proportional representation of the *States;* any remarks about districting were on the far periphery. Districting is not even a constitutional requirement. The form of the inference from the history adduced in *Wesberry* must then be that equality *among districts* is a requirement closely connected with the requirement of proportionate representation *of the States* in the House.

It is absolutely crucial, therefore (unless the inference is to rise higher than its source), to ask what the Framers meant by "equal numbers of representatives for equal numbers of people" (see *Wesberry v. Sanders,* 376 U.S. 1, 10-11 (1964)) *in the state-representation context.* Did they mean exact arithmetical equal-

ity, or some very tight approximation thereto? Or did they mean a reasonable approximation to equality?

The face of the text of Article I goes far toward showing they meant the latter. The first representation set up (Article I, §2) was *ad interim* and based on guesses, but it cannot have been supposed by anyone that any more than a rough approximation to equality of constituent numbers would be attained by an apportionment which, for example, gave three Congressmen each to New Hampshire and Georgia. Only the rarest and most improbable accident could produce anything more than approximate equality in such a scheme, yet there is no record of any drive toward more exact arithmetical equality, or of any dissatisfaction with its general non-attainment. (The size of the House of Representatives was much discussed in the Convention, but (so far as appellant can discover) the point was never made that a larger House would make possible a closer approximation to arithmetical equality of constituencies.) The words "one for every thirty thousand," in the same Section, scarcely suggest much interest in precise accuracy. The provision for there being at least one representative for each State, however small, tends in the same direction, as does the important allowance of three-fifths of the slaves in the count.

It is interesting to go on and see what the Second Congress did in apportioning on the First Census of 1790, for this tells much as to what passed for a satisfactory approximation to equality in the minds on whose intent *Wesberry v. Sanders* solely rests. The following short table tells the whole story:

State	Population Adjusted to 3/5 Formula	Number of Representatives	Number of Persons per Representative
Vermont	85,532.6	2	42,766.3
N. Hampshire	141,821.8	4	35,455.4
Maine			
Massachusetts	475,327.0	14	33,951.9
Rhode Island	68,445.8	2	34,222.9
Connecticut	236,840.4	7	33,834.3
New York	331,590.4	10	33,159.0
New Jersey	179,569.8	5	35,913.9
Pennsylvania	432,878.2	13	33,298.3
Delaware	55,539.2	1	55,539.2
Maryland	278,513.6	8	34,814.2
Virginia	630,559.2	19	33,187.3
Kentucky	68,705.0	2	34,352.5
N. Carolina	353,522.2	10	35,352.2
S. Carolina	206,235.4	6	34,372.5
Georgia	70,842.4	2	35,421.2
Total	3,615,923.0	105	34,437.4

(Calculations show a percentage range of deviation from national "ideal" district of 0.19% to 61.28%, with a median deviation (Georgia) of 2.86% and an average deviation of 7.61%.)

(Sources: Stewart, YOUR 1970 CENSUS 5 (1969); 1st Session, 2d Congress, C.23, 1 Stat. 253.)

Clearly, what is happening here is the roughest approximation to equality. Each state is getting a representative for each full 33,000, with no allowance for fractions. Yet there is no record of any dissatisfaction with this method, productive as it was of the disparities shown.

Appellant emphatically is not rearguing the case of *Wesberry v. Sanders*. That judgment was right, on any view, for the population disparity was in the nature of two or three to one. The history brought forward in *Wesberry* fully justified the conclusion that the Framers would have regarded such districting as abusive. But the history behind *Wesberry* (and that history, being *Wesberry's* sole ground, necessarily bounds and defines the substantive law of *Wesberry*) offers no support

whatever to a substantive requirement, conclusive or presumptive, of near-exact arithmetical equality, and (insofar as appellant can at this stage of the case ascertain) strongly supports the thesis that the Framers would have dismissed as utterly trivial the inequalities shown in this case.

There is no subsequent history supporting a contrary view. It is a striking fact, which ought to cast grave doubt on the *Kirkpatrick* theory of arithmetical exactness, that quite wide latitude *between* the States is now and always has been tolerated without any feeling of impropriety, as a natural consequence of the working-out of the Article I scheme. As an example, using the 1970 Census, Oklahoma (with six Congressmen) has an "ideal" Congressional district of 426,542, while Connecticut (also with six Congressmen) has an "ideal" district of 505,370—a difference of some 79,000, or more than 16% variation up and down from the average "ideal district" of the two States taken together, which happens to be close to the overall national "ideal district" of 465,352. Much wider divergences appear: Idaho (two Congressmen) has an "ideal" district of 356,504; Maine (also with two Congressmen) has an "ideal" district of 496,832.

Appellant reproduces, in Appendix E hereto, a tabulation of the range of variation, amongst the States, from the national "ideal district," according to the 1970 Census. These variations are enormous, but, as among the States, calculation shows that the *average* deviation is 7.79%, while the *median* deviation is 4.75%. This means that the "dilution" complained of in the present case is far less than the "dilution" as to either the average or the median State, as against the national "ideal." Of course it is *possible* for intra-state districts to be made more equal than these figures suggest;

the question is not what is *possible* but what is *required* by rationally derived law. If the *requirement,* as *Wesberry v. Sanders* very plainly shows, is derived from the nature of the federal scheme, has there not occurred some departure from either logic or common sense, when a requirement of very strict intra-state equality is deduced from the intendment of a scheme which was never meant to bring about any more than approximate equality, and which today, without complaint or apology or feel of wrong, produces only approximate equality?

(Parenthetically, these figures, or some calculations upon them, might suggest a concrete percentage of permissible variation; see *infra,* at the conclusion of this point (II)).

The second branch of appellant's argument on this point rests on two propositions: (1) In *Wesberry v. Sanders,* as in other leading apportionment cases, it is the *dilution or debasement of the vote* that is complained of by the litigants and condemned by this Court. Yet (2) there is, to say the least, no such precise correlation between census figures and future voting population as to make exact equality in the former anything more than a rough and unreliable indication of equality in the latter. The litigant who alleges and proves a *small* district disparity in census population has therefore failed to allege facts which ground any inference of the dilution of the power of his vote. The stubborn facts are:

(1) That all census figures are somewhat inaccurate, and that there is a serious undercount of certain elements in the population.

(2) That population shifts or grows at quite substantially different rates within different sections of a State in any decennium.

(3) That there is a surprisingly wide variation in the ratio, as among sections, of eligible voters (citizens over 18) to total population.

(4) That numerous other factors stand in the way of any establishment of a very close correlation between census population and voting population: military personnel, student population, temporary residents, migratory workers, and so on.

As to the first of these points (since, though logically first, it is probably of the least numerical importance) it is perhaps sufficient, for purposes of this Jurisdictional Statement, to refer to the material in Mr. Justice Fortas's concurring opinion in *Kirkpatrick,* 394 U.S. at p. 539, fn. 3. See also Spiegelman, INTRODUCTION TO DEMOGRAPHY (1955), Chapter 3, *Errors in Census Statistics and Vital Statistics and Their Adjustments.* (The REPORT ON ACCURACY OF THE 1970 CENSUS ENUMERATION, *House Committee on Post Office and Civil Service, Subcommittee on Census and Statistics* (1970) is somewhat equivocal in its "Findings," particularly as to inner-city count (p. 37), though generally favorable, pending statistical analysis).

As to the second and much more important point, only a little illustrative material will here be given, to bolster at this stage a proposition which is probably in any case a matter of common knowledge. The following table shows differential percentages of growth in the decennium 1960-1970, in certain conurbations within the same State:

Hartford, Conn.	20.9%	
New Haven, Conn.	10.9%	
Bridgeport, Conn.	15.1%	
Houston, Texas		40.0%
San Antonio, Texas		20.7%
Beaumont-Port Arthur, Texas		3.3%

Columbus, Ohio	21.3%
Cleveland, Ohio	8.1%
San Jose, Calif.	65.9%
Anaheim, etc., Calif.	101.7%
San Francisco-Oakland, Calif.	17.4%

(Source: Statistical Abstract of the United States, 1971, pp. 19-20.

These data illustrate what appellant submits is generally known—that (owing to factors only in part predictable—see Spiegelman, *op. cit. supra,* 257) an apportionment at the beginning of any decennium may be, and often is, badly askew a few years later; even with respect to population. This uncertain variability over any decennium is great enough to have led to widespread demands for a mid-decade census—demands apparently supported by the Subcommittee responsible for the REPORT ON ACCURACY just referred to; see p. 45 thereof.)

As to the third point, which is absolutely crucial, a single illustration may here be given. According to figures taken from the 1960 census, the then Fifteenth Congressional District in Texas had a population containing 53.54% of persons 18 or over, while the Fourth Texas showed a figure of 67.48%—an enormous percentage difference which, in districts of equal population, would produce something like 25% more persons eligible to vote in one population than in another of the same size. These are only the extremes; the full range is reproduced in Appendix F hereto. There is no reason to think this phenomenon changes, or is not national. *Taken alone, it absolutely explodes the idea that small population variations are connected in any reliable way with dilution or debasement of the vote.* And we are here dealing with *facts,* which are not amenable to change by any number of judicial holdings.

As to the fourth point, the factors are random in incidence, but unquestionably exist. Only a few examples will be given. Aliens are not equally distributed; there may be sudden influxes, as to the Miami area from Cuba in the 'sixties; South Texas, it may be remarked, is subject to influxes of migrant labor. Military installations are unpredictable of establishment and dismantlement, and of unstable size. Student population may rise or fall; student preferences as between voting at school and at home are not predictable and are likely to veer *en masse*.

What this all adds up to is this: Census population figures in a district in 1970 are to some extent to be correlated with population or with number of eligible voters in that district in 1972 or in 1975. But the correlation is rough; it affords no basis for more than the merest conjecture that any voter is to any degree suffering dilution or debasement of his future vote, when all that is shown is a few percentage-point variations in 1970 census count between his district and another. The equality in voting power produced by insistence on nearly exactly arithmetical equality in census figures is a fiction; the unyielding facts forbid its ever being any more than that. The federal judicial power should not bite deep into State political structure just to protect a fiction. Substantive constitutional law does not guard fictitious interests.

Appellant desires once more strongly to emphasize that he is not contending for the institution of a *de minimis* rule in respect to a proven violation of constitutional right. He is rather saying that, on the warrantable law of *Wesberry v. Sanders,* and in the very nature of the facts on which legislatures and courts can operate, no constitutional violation at all is shown

when all that is shown is a few percentage-points variation up and down as among districts.

It follows, in appellant's view, that the strict rule of *Kirkpatrick v. Preisler* is substantively in error. If, however, that rule threatened no harm, then the doctrine of *stare decisis* might lead to the following of the case. It is appellant's contention that one need look no further than this Record to see that great harm threatens from the *Kirkpatrick* rule.

It is submitted that the words ". . . the plan of this Court for the congressional districts of the State of Texas . . ." are chilling words. We have gotten to a place no one wanted to get to, a place bewilderingly outside the bounds of sound distribution of function among the branches of government and the components of the Union. Commentators have pointed out—and it is a quite plausible conjecture—that we will often get to this point, under the *Kirkpatrick* rule. And we will get there in cases, like this, where harm to any identifiable individual or class is not so much trivial (though, at worst, it is that) as entirely conjectural. (For another sobering example of the sort of involvement the lower courts are getting into, see *67th Minnesota State Senate v. Beens*, — U.S. —, 92 S. Ct. 1477 (1972). As a matter of fact, consideration of point three, *infra*, illustrates the undesirable position into which the lower courts have been led by the *Kirkpatrick* doctrine.)

Districting by courts is evidently undesirable (quite aside from the abrasions produced and the addition to the judicial work-load) for the general reason that districting, whether or not population equality is observed, always and inevitably involves choices amongst a near-infinity of possibilities, choices which cannot be made according to law, because nothing in law or derivable from law assists in making them. Any doc-

trine leading to the referral of such choices to the courts ought to be examined with the most earnest care.

Appellant urges that now is the time to modify a rule without substantive warrant or practical benefit. Everything good in the apportionment decisions can be preserved, and all the friction removed, by the recognition of a rule of reasonable approximation—a recognition compelled by a proper view of the governing substantive law.

The present judgment must be reversed, and Senate Bill One validated, if any modification in the rule of strict arithmetical equality be mandated by law, for the deviations herein shown clearly fall well within any imaginable area of reasonable approximation. Such a holding might, however, leave the courts below, and this Court, in somewhat the same position of inextricable involvement in State political processes as the *Kirkpatrick* rule has here produced, for judgments of sheer "reasonableness" must be made case-by-case. Appellant will, therefore, further contend that this Court may warrantably set a fixed percentage figure of variation permissible without inquiry, so long as independent constitutional norms are not invokable. Such a figure could not properly be called arbitrary; it is never "arbitrary" to do that which is needful. The much panegyrized remedial flexibilities of equity are not so constricted that the selection of a number, where a number is urgently required, is beyond them. [*United States v. Thirty-seven Photographs,* 402 U.S. 363, 372-375, (1971) is here very closely in point. Cf. *Dunn v. Blumstein,* — U.S. —, 92 S. Ct. 995, 1006 (1972).] Such a provision has already been suggested in Mr. Justice White's dissenting opinion in *Kirkpatrick,* 394 U.S. at 553, and has been advocated by one commentator as a constitutional amendment, Dixon, *The*

Warren Court Crusade for the Holy Grail of "One Man—One Vote," 1969 SUPREME COURT REVIEW 219, 234-243. Professor Dixon makes an unanswerable case for the utility and justice of such a rule, but it will be appellant's submission that equity does not need a constitutional amendment, or even a statute, to serve utility and justice in the remedially apt manner. Moreover, as has been suggested *supra,* the state median and average variations from the national ideal district, taken together, might readily be held to provide a rationale for a flexibility of perhaps six percent up or down. The firm designation of such a percentage would cure all the evils in the situation. Any Legislature could proceed confidently and stay well within the law; no voter, as has been shown, would have any substantively valid ground for complaint; the courts would be out of the picture, in the normal run of cases.

III.

Whatever the Court's disposition of the preceding points, this judgment evidently must be reversed, since there was no conceivable warrant for the Court's adopting Plan C as ". . . the plan of this Court for the congressional districts of the State of Texas . . .", and the procedure leading to that adoption was grossly defective.

It is appellant's earnest hope that this Court, for the reasons already given, will uphold the Texas Legislature's plan. But, even if this should not occur, on no view can the adoption of Plan C be upheld, and this judgment must accordingly be reversed.

The Court below had before it four plans—the Legislature's plan, two plans submitted by plaintiffs, Plans B and C, and a plan submitted by intervenors. Plan B more closely follows the Legislature's plan than does

Plan C, and actually deviates less than Plan C from population equality. If, then (as appellant contends was not the case), the duty of the Court below had been confined to that of selecting among plans submitted by plaintiffs, it is perfectly plain that Plan B ought to have been selected. No reasons of an order of magnitude remotely commensurate with the puzzling and very serious choice made are given in the short *per curiam* opinion, or in any argument at any time tendered by appellees. The transcript of argument at the trial below on January 21, 1972, shows that even plaintiffs' counsel repeatedly recommended the adoption of Plan B. Nothing whatever in the Record supports or even bears upon the choice made.

It is submitted that what the court below should have done, having resolved that Senate Bill One was unconstitutional, was to invite proposals, from all parties at the least, and perhaps from all who chose to intervene (for the plaintiffs had no special status as guardians of the public weal). (The State of Texas had up to that point had no occasion to prepare or submit a substitute plan, for its *bona fide* contention had been (as it still is) that Senate Bill One was acceptable, and the proposal of a plan, before the adverse judgment on Senate Bill One was known, would have constituted an usurpation of the Legislature's powers by those law officers whose duty it was to defend the Legislature's action.) The court below should then have begun consideration of an appropriate decree, giving maximum weight to the Legislature's judgments, consistent with its own views on population requirements.

There is in the Record no evidence whatever on the practicality, prudence or wisdom of Plan C, nor even any distinct indication that these things were considered *in camera*.

In these procedural and substantive aspects, the District Court's adoption of Plan C is utterly unsupportable, and the judgment of which it is the heart cannot stand.

CONCLUSION

For the foregoing reasons, appellant respectfully submits that the questions presented herein are highly substantial, going to the essence of sound political structuring and judicial action thereon, and merit full consideration by this Court.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO CA-3-5202-D
(Three Judge Court)

DAN WEISER, ET AL.

v.

HONORABLE BOB BULLOCK, SECRETARY
OF STATE OF THE STATE OF TEXAS

[filed January 22, 1972]

OPINION AND ORDER

Before INGRAHAM, Circuit Judge, and TAYLOR and HILL, District judges.

Per Curiam: Plaintiffs attack the constitutionality of the Texas statute establishing congressional districts for the State of Texas, S.B. 1, now codified as Art. 197d, V.A.C.S. (1971). Under the provisions of secs. 2 through 25 of S.B. 1, the population of the largest legislative district established is 19,275 persons greater than that of the smallest district, producing a deviation of 4.1 percent.

In *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), the Supreme Court held that in congressional redistricting a State must "make a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530. Population variances are not permissible unless the State shows either that they resulted despite such an effort or unless "the State (justifies) each variance, no matter how small." 394 U.S. at 531. The record in

this case fails to show that in the enactment of S.B. 1 the Legislature of the State of Texas "came as close to equality as it might have come." 394 U.S. at 531. Nor has the State justified the variances in S.B. 1 within the principles laid down in *Kirkpatrick*. Therefore this Court holds that S.B. 1 is unconstitutional. Accordingly, defendant is enjoined from conducting or permitting any primary or general elections based upon the districts established by S.B. 1.

Van Henry Archer, Jr., individually and as Chairman of the Bexar County Republican Party, and others, have applied to this Court for leave to intervene as plaintiffs. Leave to intervene is hereby granted to the extent stated by the attorney for intervenors in open court.

Defendant has not submitted any plan of reapportionment as an alternative to S.B. 1. Plaintiffs have proposed two plans, B and C. Plan B is based on S.B. 1, but has a significantly lower deviation than S.B. 1. Plan C is based solely on population and is significantly more compact and contiguous than either S.B. 1 or Plan B. The population deviation in Plan C is less than 3/10 of one percent (.0028). The Court has considered Plans B and C, as well as the plan submitted by the intervening plaintiffs, and concludes that Plan C best effectuates the principle of "one man, one vote" enunciated by the Supreme Court.

It is therefore ORDERED that Plan C, as set forth in detail in Exhibit A attached hereto and made a part hereof, be and it is hereby adopted as the plan of this Court for the congressional districts of the State of Texas and said plan is hereby declared to be in effect and operative immediately upon the signing of this Opinion and Order as establishing the Congressional Districts of the State of Texas.

This Order is entered without prejudice to the legislative and executive branches of the State of Texas to proceed with the consideration and adoption of any other constitutionally permissible plan of congressional redistricting at a called or regular session of the Legislature of the State of Texas. This Court retains jurisdiction of this cause for the purposes of considering any such plan which might be adopted by the Legislature of the State of Texas until congressional reapportionment is enacted based on the Twentieth Decennial Census to be conducted in 1980.

The deadline in Texas for the filing by candidates for Congress of the United States is February 7, 1972. This Court also retains jurisdiction for the purpose of extending the filing deadline for candidates in congressional districts in the event it is made known to this Court that a called session of the Legislature will include congressional reapportionment.

Plaintiffs sue on behalf themselves and all other qualified voters, registered and unregistered, within the several districts wherein the respective plaintiffs reside as well as all other qualified voters in all other congressional districts in the State of Texas. The Order entered herein is determinative of the rights of all others regarding congressional redistricting. Proceeding herein with this cause as a class action is not only unnecessary but creates problems with reference to notice and the rights of other individual members of the class. Maintenance of this cause as a class action is hereby denied.

Copies of this judgment and order will be forwarded to all attorneys of record, the Governor of the State of Texas, the Lieutenant Governor of the State of Texas, the Speaker of the House of Representatives of the

State of Texas. the Secretary of State of the State of Texas, and the Attorney General of the State of Texas.

It is further ORDERED that this judgment be considered, for purposes of appeal and otherwise, as a final judgment in this case, and that no stay proceedings pending appeal will be granted by this Court.

Dated at Dallas, Texas this 22nd day of January, 1972.

JOE INGRAHAM
United States Circuit Judge

WM. M. TAYLOR, JR.
United States District Judge

ROBERT M. HILL
United States District Judge

EXHIBIT A

DISTRICT 1 is composed of Bowie, Camp, Cass, Delta, Fannin, Franklin, Grayson, Harrison, Hopkins, Lamar, Marion, Morris, Rains, Red River, Rockwall, Titus, Upshur and Wood Counties; and all of Hunt County not included in the Celeste census county division.

DISTRICT 2 is composed of Angelina, Brazos, Grimes, Hardin, Houston, Jasper, Liberty, Madison, Montgomery, Newton, Orange, Polk, Robertson, Sabine, San Augustine, San Jacinto, Trinity, Tyler, and Walker Counties; and that part of Leon County included in the Centerville and Oakwood census county divisions.

DISTRICT 3 is composed of that part of the city of Richardson in the Plano census county division of Collin County, and that part of Dallas County included in census tracts 1, 2.01, 2.02, 3, 6.01, 6.02, 7.02, 9, 10,

11.01, 11.02, 12, 14, 71.01, 72, 73.01, 73.02, 74, 75.01, 75.02, 76.01, 76.02, 76.03, 76.04, 77, 78.01, 78.02, 78.03, 79.01, 79.02, 80, 81, 82, 94, 95, 96.01, 96.02, 96.03, 96.04, 97, 98, 99, 128, 129, 130.01, 130.02, 131, 132, 133, 134.01, 134.02, 135, 136.01, 136.02, 136.03, 137.01, 137.02, 137.03, 137.04, 137.05, 138.01, 138.02, 139, 140.01, 140.02, 141.01, 141.02, 141.03, 141.04, 142, 143, 144, 145, 146, 147, 185.02, 190.02, 190.03, 190.04, 191, 192.01, 192.02, 192.03, 192.04, 192.05, 192.06, 192.07, 193.01, 193.02, 194, 195.01, 195.02, 196, 197 and 198.

DISTRICT 4 is composed of Anderson, Cherokee, Freestone, Gregg, Henderson, Kaufman, Nacogdoches, Navarro, Panola, Rusk, Shelby, Smith and Van Zandt Counties; and that part of Leon County not included in District 2.

DISTRICT 5 is composed of that part of Dallas County not included in District 3 or 24.

DISTRICT 6 is composed of Hood and Johnson Counties; and that part of Tarrant County included in census tracts 13, 14.01, 14.03, 16, 19, 23.01, 23.02, 24.01, 24.02, 25, 26, 28, 29, 30, 31, 32, 33, 34, 36.01, 36.02, 37.01, 37.02, 38, 39, 40, 41, 42.01, 42.02, 43, 44, 45.01, 45.02, 45.03, 46.01, 46.02, 46.03, 46.04, 46.05, 47, 48.01, 48.02, 51, 52, 53, 54.01, 54.02, 55.01, 55.02, 55.03, 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 60.03, 61.01, 61.02, 62, 63, 64, 65.01, 65.02, 65.03, 65.04, 65.05, 108.01, 108.02, 108.03, 109, 110.01, 110.02, 111.01, 111.02, 112.01, 112.02, 113, 114, 115.01, 115.02, 115.03, 115.04, 130, 131, 216.01, 216.02, 216.03, 217.01, 217.02, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228 and 229.

DISTRICT 7 is composed of that part of Harris County included in census tracts 558, 557, 554, 553, 552, 556, 555, 551, 545, 550, 549, 548, 547, 546, 544, 537, 538, 541, 540, 452, 451, 543, 542, 529, 528, 527, 526, 519, 517,

443, 442, 441, 444, 447, 448, 450, 449, 446, 445, 440, 421, 406, 420, 422, 439, 438, 437, 436, 423, 419, 424, 435, 407, 409, 408, 411, 418, 417, 416, 425, 426, 434, 429, 428, 427, 433, 431, 432, 333, 413, 334, 536, and 430; and that part of census tract 405 included in census block group 5.

DISTRICT 8 is composed of that part of Harris County included in census tracts 559, 244, 245, 243, 242, 535, 241, 533, 240, 223, 531, 532, 222, 221, 224, 525, 524, 523, 522, 220, 218, 225, 217, 216, 216, 227, 521, 229, 228, 230, 214, 203, 209, 213, 231, 212, 202, 210, 211, 232, 233, 321, 320, 322, 350, 351, 352, 354, 234, 262, 261, 267, 268, 263, 265, 266, 270, 269, 271, 264, 361, 362, 273, 274, 272, 275, 364, 360, 363, 365, 530, 539, 534, 254 and 353.

DISTRICT 9 is composed of Chambers, Galveston and Jefferson Counties and that part of Harris County included in census tracts 250, 249, 247, 238, 251, 248, 246, 252, 253, 237, 236, 256, 255, 257, 258, 235, 259, 260, 226 and 239.

DISTRICT 10 is composed of Austin, Bastrop, Blanco, Caldwell, Fayette, Hays, Travis, and Washington Counties; that part of Guadalupe County included in the Seguin East, Seguin North, and Seguin Southwest census county divisions; that part of Lavaca County included in the Moulton and Shiner census county divisions; all of Waller County not included in the Brookshire census county division; all of Colorado County not included in the Garwood census county division; and all of Gonzales not included in the Nixon census county division.

DISTRICT 11 is composed of Bell, Bosque, Burleson, Burnett, Coryell, Falls, Hamilton, Lampasas, Lee, Limestone, McLennan, Milam, Mills, Somervell and Williamson Counties; that part of Brown County included in the Brookesmith census county division; and

that part of San Saba County included in the San Saba North census county division.

DISTRICT 12 is composed of Cooke and Denton Counties; that part of Collin County not included in District 3, that part of Tarrant County not included in District 6, and that part of Hunt County not included in District 1.

DISTRICT 13 is composed of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Collingworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hutchinson, Kent, King, Lamb, Lipscomb, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Stonewall, Swisher and Wheeler Counties; that part of Knox County not included in District 17, that part of Haskell County not included in District 17, and that part of Hockley County not included in District 19.

DISTRICT 14 is composed of Aransas, Calhoun, Jackson, Matagorda, Nueces, Refugio, San Patricio, Victoria and Wharton Counties; that part of Colorado County not included in District 10; and that part of Lavaca County not included in District 10.

DISTRICT 15 is composed of Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy, and Zapata Counties; that part of Bee County included in the Pettus-Pawnee census county division; and that part of Karnes County included in the Kenedy census county division.

DISTRICT 16 is composed of Brewster, Crane, Culberson, El Paso, Hudspeth, Jeff Davis, Loving, Pecos, Presidio, Reeves, Terrell, Val Verde, Ward, and Winkler Counties.

DISTRICT 17 is composed of Archer, Baylor, Callahan, Clay, Comanche, Eastland, Erath, Jack, Jones, Montague, Palo Pinto, Parker, Shackelford, Stephens, Taylor, Throckmorton, Wichita, Wilbarger, Wise and Young Counties; that part of Haskell County included in the Hasket and Weinert census county divisions, and that part of Knox County included in the Goree census county division.

DISTRICT 18 is composed of that part of Harris County not included in District 7 or 8 or 9 or 22.

DISTRICT 19 is composed of Andrews, Borden, Cochran, Dawson, Ector, Gaines, Garza, Howard, Lubbock, Lynn, Martin, Midland, Terry, Upton and Yoakum Counties; and that part of Hockley County included in the Ropesville census county division.

DISTRICT 20 is composed of that part of Bexar County included in census tracts 1106, 1107, 1203, 1204, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1218, 1219, 1601, 1604, 1605, 1606, 1607, 1614, 1615, 1616, 1617, 1618, 1619, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1901, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916 and 1917.

DISTRICT 21 is composed of Bandera, Coke, Coleman, Comal, Concho, Crockett, Dimmit, Edwards, Fisher, Frio, Gillespie, Glasscock, Irion, Kendall, Kerr, Kimble, Kinney, LaSalle, Llano, Mason, Maverick, McCulloch, Medina, Menard, Mitchell, Nolan, Reagan, Real, Runnels, Schleicher, Scurry, Sterling, Sutton, Tom Green, Uvalde, Webb and Zavala Counties; that part of Brown County not included in District 11, that part of San Saba County not included in

District 11 and that part of Atascosa County not included in District 23.

DISTRICT 22 is composed of Brazoria and Fort Bend Counties; that part of Waller County not included in District 10; and that part of Harris County included in census tracts 412, 414, 415, 331, 332, 329, 366, 339, 340, 335, 338, 336, 337, 341, 343, 342, 319, 325, 326, 324, 410, 355, 356, 349, 357, 358, 348, 359, 347, 346, 345, 370, 367, 369, 368, 373, 374, 371, 372, 375, 327, 323 and 344.

DISTRICT 23 is composed of DeWitt, Goliad and Wilson Counties; that part of Bee County not included in District 15; that part of Karnes County not included in District 15; that part of Guadalupe County not included in District 10; that part of Atascosa County included in the Poteet census county division; that part of Gonzales County not included in District 10; and that part of Bexar County not included in District 20.

DISTRICT 24 is composed of Ellis and Hill Counties and that part of Dallas County included in census tracts 4.01, 4.02, 4.03, 5, 7.01, 20, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 56, 57, 59.01, 59.02, 60.01, 60.02, 61, 62, 63.01, 63.02, 64, 65, 67, 68, 69, 71.02, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111.01, 111.02, 112, 113, 148, 149, 150, 151, 152, 153.01, 153.02, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165.01, 165.02, 165.03, 165.04, 165.05, 166.01, 166.02, 166.03, 166.04, 167.01, 167.02, 168, 169.01, 169.02, 169.03, 169.04 and 199.

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-5202-D

DAN WEISER, ET AL.
v.
HONORABLE BOB BULLOCK, SECRETARY
OF STATE OF THE STATE OF TEXAS
[filed January 25, 1972]

ORDER

Plaintiffs having moved the Court to amend its Opinion and Order of the 22nd day of January, 1972 pursuant to Rule 60(a) of the Rules of Federal Procedure, and the Court being of the opinion that the amendment solely rectifies clerical errors and that the motion should be granted;

It is ORDERED that Congressional District 10 described in the Opinion and Order of this Court of January 22, 1972 shall be amended so as to read as follows:

> DISTRICT 10 is composed of Austin, Bastrop, Blanco, Caldwell, Fayette, Hays, Travis, and Washington Counties; that part of Guadalupe County included in the Seguin East, Seguin North, and Seguin Southeast census county divisions; that part of Lavaca County included in the Moulton and Shiner census county divisions; all of Wallar County not included in the Brookshire census county division; all of Colorado County not included in the Garwood censes county division; and all of Gonzales not included in the Nixon census county division.

It is so ORDERED that Congressional District 24 described in the Opinion and Order of this Court of January 22, 1972 shall be amended so as to read as follows:

> DISTRICT 24 is composed of Ellis and Hill Counties and that part of Dallas County included in census tracts 4.01, 4.02, 4.03, 5, 18, 20, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 56, 57, 59.01, 59.02, 60.01, 60.02, 61, 62, 63.01, 63.02, 64, 65, 67, 68, 69, 71.02, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111.01, 111.02, 112, 113, 148, 149, 150, 151, 152, 153.01, 153.02, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165.01, 165.02, 165.03, 165.04, 165.05, 166.01, 166.02, 166.03, 166.04, 167.01, 167.02, 168, 169.01, 169.02, 169.03, 169.04 and 199.

Copies of this Order will be forwarded to all attorneys of record, the Governor of the State of Texas, the Lieutenant Governor of the State of Texas, the Speaker of the House of Representatives of the State of Texas, the Secretary of State of the State of Texas, and the Attorney General of the State of Texas.

Dated at Dallas, Texas this 25th day of January, 1972.

JOE INGRAHAM
United States Circuit Judge

W. M. TAYLOR, JR.
United States District Judge

ROBT. M. HILL
United States District Judge

APPENDIX B

APPORTIONMENT—CONGRESSIONAL DISTRICTS

CHAPTER 12"

S. B. No. 1

An Act relating to reapportionment of congressional districts; repealing Chapter 342, Acts of the 60th Legislature, Regular Session, 1967 (Article 197c, Vernon's Texas Civil Statutes); and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. The State of Texas is apportioned into Congressional Districts as provided in the following sections. Each district is entitled to elect one Member to the House of Representatives of the Congress of the United States.

Sec. 2. District 1 is composed of Bowie, Camp, Cass, Cherokee, Delta, Fannin, Franklin, Harrison, Henderson, Hopkins, Lamar, Marion, Morris, Panola, Red River, Rusk, San Augustine, Shelby, Titus, Upshur, and Wood Counties.

Sec. 3. District 2 is composed is Anderson, Angelina, Freestone, Grimes, Hardin, Houston, Jasper, Leon, Liberty, Madison, Montgomery, Nacogdoches, Newton, Orange, Polk, Sabine, San Jacinto, Trinity, Tyler, and Walker Counties.

Sec. 4. District 3 is composed of that part of Dallas County included in census tracts 192.05, 192.06, 192.07, 192.04, 192.03, 192.02, 192.01, 191, 190.02, 190.03, 185.02, 130.02, 130.01, 78.03, 78.02, 136.02, 136.03, 132, 133, 131,

"Vernon's Ann.Civ.St. art. 197d, §§ 1-29.

78.01, 76.04, 77, 136.01, 96.04, 134.02, 76.03, 75.02, 137.04, 137.05, 138.01, 96.03, 96.02, 134.01, 135, 76.01, 76.02, 75.01, 74, 73.01, 73.02, 71.02, 4.03, 95, 94, 98, 97, 96.01, 138.02, 137.01, 137.02, 139, 140.01, 72, 6.01, 4.02, 4.01, 6.02, 5, 19, 100, 99, 137.03, 140.02, 142, 148, 147, 146, 145, 152, 149, 150, 151, 198, 143, 101, 102, 103, 104, 69, 68, 43, 44, 42, 20, 105, 106, 190.04, 1955.01, 18, 7.01, and 41.

Sec. 5. District 4 is composed of Collin, Grayson, Hunt, Gregg, Kaufman, Rains, Rockwall, Smith, and Van Zandt Counties, and that part of Dallas County included in census tracts 181.01, 181.02, 181.03, 181.04, and 182.

Sec. 6. District 5 is composed of that part of Dallas County included in census tracts, 190.01, 190.06, 190.07, 190.05, 189, 188, 185.01, 186, 187, 183, 184, 126, 127, 128, 129, 180, 125, 124, 82, 179, 123, 122.01, 81, 80, 1, 12, 79.01, 193.01, 193.02, 3, 2.02, 2.01, 10, 11.01, 11.02, 14, 15.01, 13.01, 13.02, 15.02, 22.02, 31.02, 30, 33, 34, 29, 35, 36, 28, 23, 24, 25, 26, 27.01, 27.02, 37, 38, 39.01, 39.02, 40, 83, 84, 85, 91.01, 91.02, 93.01, 93.02, 115, 122.02, 178.01, 178.02, 90.01, 90.02, 92.01, 121, 120, 119, 176.02, 176.01, 172, 175, 174, 177, 173.02, 173.01, 170, 194, 195.02, 71.01, 197, 196, 7.02, 9, 8, 16, 22.01, 17.01, 21, 31.01, 32.01, 32.02, 118, 92.02, 79.02, and 17.02.

Sec. 7. District 6 is composed of Brazos, Ellis, Hill, Johnson, Limestone, Navarro, and Robertson Counties; that part of Dallas County included in census tracts 164, 165.01, 165.02, 165.03, 165.04, 165.05, 166.04, 166.03, 166.02, 166.01, 109, 108, 61, 110, 111.01, 111.02, 112, 113, 167.01, 167.02, 168, 169.04, 169.01, 169.02, 169.03, 171, 116, and 117; and that part of Tarrant County included in census tracts 108.03, 109, 54.01, 55.01, 54.02, 42.01, 43, 42.02, 48.01, 47, 56, 48.02, 55.02, 57.01, 58, 59, 60.02, 60.01, 110.02, 57.02, 55.03, 55.04, and 110.01.

Sec. 8. District 7 is composed of that part of Harris County included in census tracts 558, 557, 554, 553, 552, 556, 555, 551, 545, 550, 549, 548, 547, 546, 544, 537, 538, 541, 540, 452, 451, 543, 542, 529, 528, 527, 526, 519, 517, 443, 442, 441, 444, 447, 448, 450, 449, 446, 445, 440, 421, 406, 420, 422, 439, 438, 437, 436, 423, 419, 424, 435, 407, 409, 408, 411, 418, 417, 416, 425, 426, 434, 429, 428, 427, 433, 430, 431, 432, 410, and 413, and that part of census tract 405 included in census block group 5.

Sec. 9. District 8 is composed of that part of Harris County included in census tracts 559, 244, 245, 243, 242, 536, 535, 241, 533, 240, 223, 531, 532, 222, 221, 224, 525, 524, 523, 522, 220, 218, 225, 217, 216, 215, 227, 208, 229, 228, 230, 214, 203, 209, 213, 231, 212, 202, 210, 211, 232, 233, 321, 320, 322, 350, 351, 352, 354, 234, 262, 261, 267, 268, 263, 265, 266, 270, 269, 271, 264, 361, 362, 273, 274, 272, 275, 364, 360, 363, 365, 530, 539, and 534.

Sec. 10. District 9 is composed of Chambers, Galveston, and Jefferson Counties and that part of Harris County included in census tracts 250, 249, 247, 238, 251, 248, 246, 252, 253, 237, 236, 254, 256, 255, 257, 258, 235, 259, 260, 226, and 239.

Sec. 11. District 10 is composed of Austin, Bastrop, Blanco, Burleson, Caldwell, Colorado, Fayette, Hays, Lee, Travis, Waller, and Washington Counties.

Sec. 12. District 11 is composed of Bell, Bosque, Burnet, Coryell, Falls, Hamilton, Hood, Lampasas, McLennan, Milam, Mills, Parker, Somervell, and Williamson Counties.

Sec. 13. District 12 is composed of that part of Tarrant County not included in district 6 or 24.

Sec. 14. District 13 is composed of Archer, Armstrong, Baylor, Briscoe, Carson, Childress, Clay, Collingsworth, Cottle, Dallam, Dickens, Donley, Foard, Gray, Hall, Hansford, Hardeman, Hartley, Hemphill, Hutchinson, King, Knox, Lipscomb, Moore, Motley, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Swisher, Wheeler, Wichita, and Wilbarger Counties.

Sec. 15. District 14 is composed of Aransas, Calhoun, Jackson, Matagorda, Nueces, Refugio, San Patricio, Victoria, and Wharton Counties, and that part of Brazoria County included in enumeration districts 108, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 153B, 158, 159, 160, and 160B.

Sec. 16. District 15 is composed of Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy, and Zapata Counties.

Sec. 17. District 16 is composed of Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Loving, Presidio, Reeves, Ward, and Winkler Counties, and that part of Ector County not included in district 19.

Sec. 18. District 17 is composed of Borden, Brown, Callahan, Coleman, Comanche, Cooke, Crosby, Eastland, Erath, Fisher, Floyd, Garza, Haskell, Howard, Jack, Jones, Kent, McCulloch, Mitchell, Montague, Nolan, Palo Pinto, San Saba, Scurry, Shackelford, Stephens, Stonewall, Taylor, Throckmorton, Wise, and Young Counties.

Sec. 19. District 18 is composed of that part of Harris County included in census tracts 219, 521, 520, 510, 518, 509, 207, 511, 513, 512, 507, 508, 206, 204, 205, 503, 506, 516, 514, 515, 505, 504, 502, 501, 201, 121, 401, 126,

121, 123, 402, 125, 403, 404, 124, 303, 302, 301, 311, 310, 312, 309, 313, 304, 306, 305, 316, 307, 308, 314, 315, 317, 330, 318, 328, and that part of census tract 405 not included in census block group 5.

Sec. 20. District 19 is composed of Andrews, Bailey, Castro, Cochran, Dawson, Deaf Smith, Gaines, Hale, Hockley, Lamb, Lubbock, Lynn, Martin, Midland, Parmer, Terry, and Yoakum Counties, and that part of Ector County included in census tracts 3, 4, 5, 6, 7, 24, and 25, and that part of census tract 21 East of U. S. Highway 385 and North of the Texas and Pacific Railroad.

Sec. 21. District 20 is composed of that part of Bexar County not included in district 21 or 23.

Sec. 22. District 21 is composed of Bandera, Coke, Comal, Concho, Crane, Crockett, Edwards, Gillespie, Glasscock, Irion, Kendall, Kerr, Kimble, Kinney, Llano, Mason, Menard, Pecos, Reagan, Real, Runnels, Schleicher, Sterling, Sutton, Terrell, Tom Green, Upton, Uvalde, and Val Verde Counties, and that part of Bexar County included in census tracts 1719, 1720, 1816, 1817, 1806, 1807, 1815, 1821, 1820, 1819, 1915, 1916, 1914, 1818, 1814, 1809, 1810, 1811, 1813, 1812, 1911, 1912, 1909, 1913, 1207, 1210, 1209, 1208, 1206, 1203, 1204, 1803, 1808, 1802, 1908, 1718, 1717, 1714, 1805, 1917, 1211, 1212, 1213, 1617, 1219, 1218, and 1215.

Sec. 23. District 22 is composed of Fort Bend County; that part of Brazoria County not included in district 14; and that part of Harris County included in census tracts 412, 414, 415, 331, 329, 332, 333, 334, 339, 340, 335, 338, 336, 337, 341, 343, 342, 319, 325, 326, 324, 334, 353, 355, 356, 349, 357, 358, 366, 348, 359, 347, 346, 345, 370, 367, 369, 368, 373, 374, 371, 372, 375, 327, and 323.

Sec. 24. District 23 is composed of Atascosa, Bee, DeWitt, Dimmit, Frio, Goliad, Gonzales, Guadalupe, Karnes, LaSalle, Lavaca, Maverick, Medina, Webb, Wilson, and Zavala Counties, and that part of Bexar County included in census tracts 1619, 1620, 1612, 1613, 1610, 1611, 1512, 1520, 1521, 1513, 1511, 1514, 1516, 1518, 1519, 1522, 1416, 1415, 1418, 1417, 1414, 1413, 1419, 1312, 1313, 1314, 1310, 1309, 1315, 1205, 1214, 1217, 1216, 1317, 1316, 1318, 1517, 1615, and 1618.

Sec. 25. District 24 is composed of Denton County; that part of Dallas County included in census tracts 153.01, 153.02, 144, 141.04, 141.03, 141.02, 154, 161, 141.01, 155, 160, 162, 156, 157, 159, 163, 158, 107, 67, 199, 65, 64, 45, 53, 52, 46, 47, 51, 50, 63.02, 62, 48, 54, 56, 49, 89, 55, 88, 86, 114.02, 87.01, 87.02, 57, 59.01, 59.02, 60.01, 63.01, 114.01, and 60.02, and that part of Tarrant County included in census tracts 65.05, 131, 130, 218, 217.02, 217.01, 216.02, 216.01, 65.04, 65.01, 14.01, 65.02, 65.03, 14.03, 3, 216.03, 115.01, 115.02, 222, 223, 225, 224, 221, 220, 219, 229, 228, 227, 226, 115.03, 115.04, 114, 111.02, 60.03, 112.02, 112.01, and 113.

Sec. 26. The terms "census tract" and "census enumeration district" as used in this Act, mean those geographic areas outlined and identified as such on official place, county, and metropolitan map series maps prepared by the United States Department of Commerce Bureau of the Census for the Nineteenth Decennial Census of the United States, enumerated as of April 1, 1970. "Block groups" are subdivisions of census tracts as defined on census metropolitan maps which differentiate block groups by the first digit of the block numbers assigned to city blocks within each tract.

Sec. 27. The Texas Legislative Council shall furnish to the Commissioners Court of each county which

is divided into two or more districts appropriate maps showing census tract, census enumeration district, or census block group lines to facilitate the identification of district lines.

Sec. 28. Chapter 342, Acts of the 60th Legislature, Regular Session, 1967 (Article 197c, Vernon's Texas Civil Statutes), is repealed.[42]

Sec. 29. Nothing in this Act affects the tenure in office of the present delegation in Congress, but this Act takes effect for the general election in 1972.

Sec. 30. The importance of this legislation and the crowded condition of the calendars in both Houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended.

Passed the Senate on June 1, 1971, by a viva voce vote; June 2, 1971, Senate refused to concur in House amendments and requested appointment of Conference Committee; June 2, 1971, House granted request of the Senate; June 4, 1971, Senate adopted Conference Report: Yeas 17, Nays 9, and one paired vote; passed the House on June 2, 1971, with amendments: Yeas 66, Nays 49; June 2, 1971, House granted request of the Senate for appointment of Conference Committee; June 4, 1971, House adopted Conference Report: Yeas 80, Nays 53, and one present not voting.

Approved June 17, 1971.

Effective Sept. 3, 1971, 90 days after date of adjournment.

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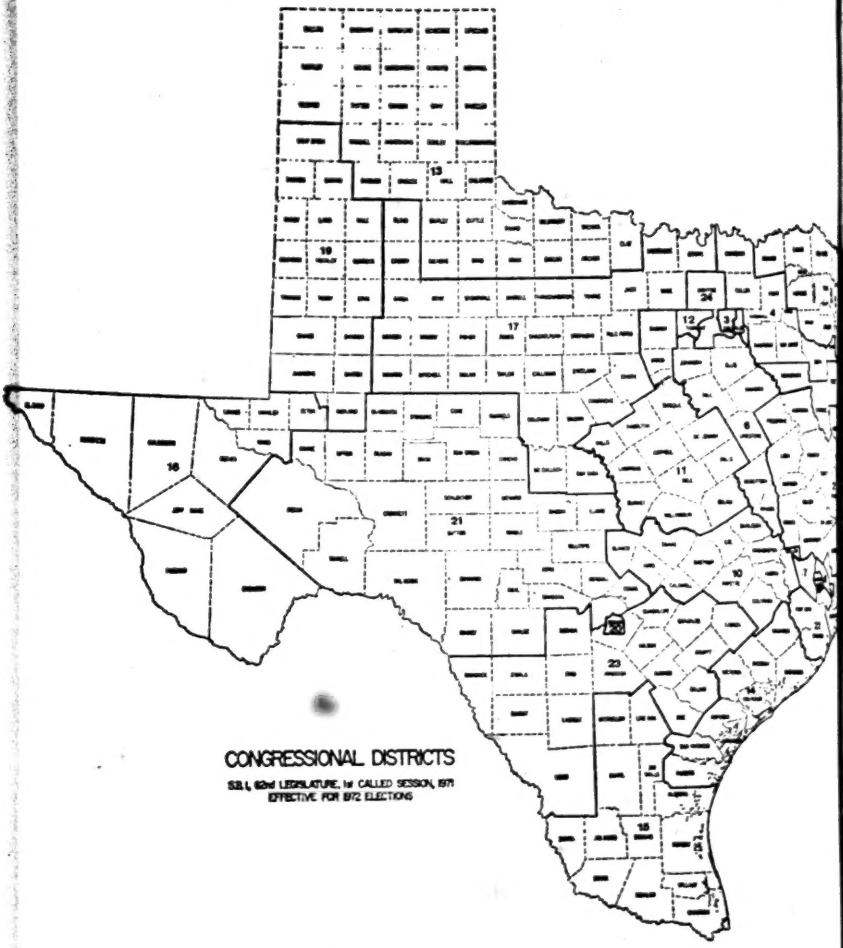
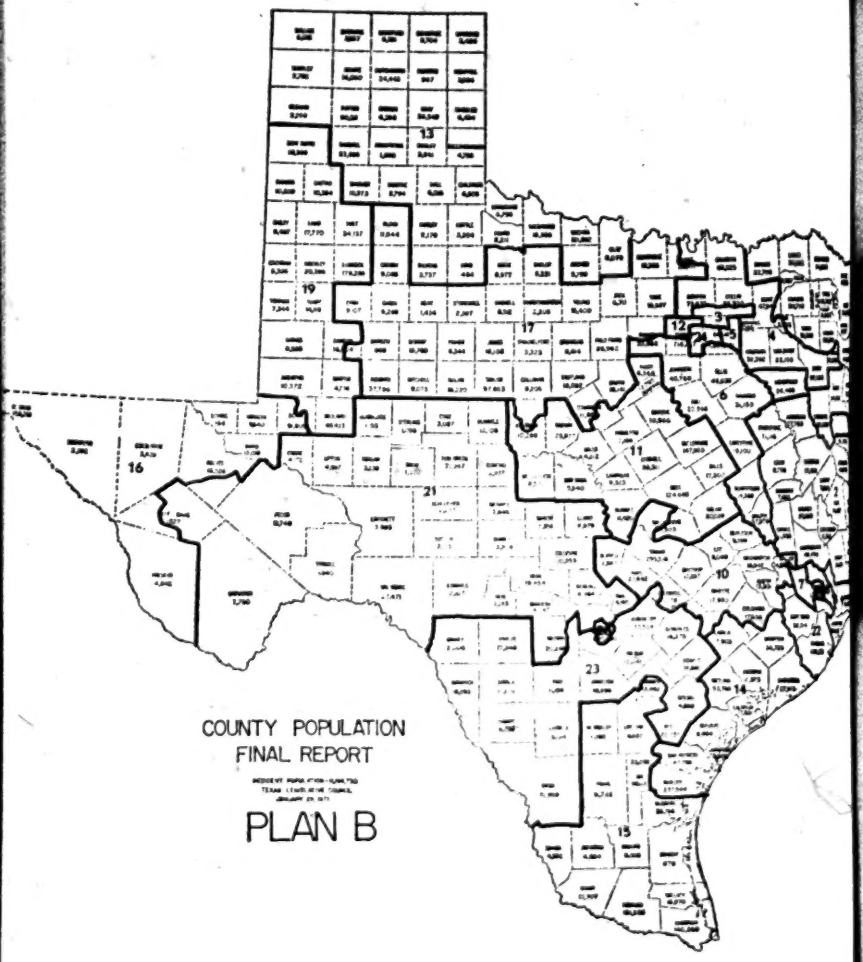
[42]Vernon's Ann. Civ.St. art. 197c, repealed.


CONGRESSIONAL DISTRICTS
SB 1, 62nd LEGISLATURE, 1st CALLED SESSION, 1971
EFFECTIVE FOR 1972 ELECTIONS

DEVIATION TABLE
SENATE BILL ONE
[from the Complaint]

District	Population	Difference (±)	% Difference
1	461,879	—4651	1.00
2	466,836	+ 306	.01
3	465,221	—1309	.28
4	463,142	—3388	.73
5	465,093	—1437	.31
6	467,913	+1383	.30
7	461,704	—4826	1.03
8	461,216	—5314	1.14
9	467,483	+ 953	.20
10	465,493	—1037	.22
11	468,148	+1618	.35
12	465,671	— 859	.18
13	477,856	+11,326	2.43
14	467,839	+1309	.28
15	458,581	—7949	1.70
16	477,614	+11,084	2.38
17	467,912	+1382	.30
18	462,062	—4468	.96
19	477,459	+10,929	2.34
20	467,942	+1412	.30
21	466,656	+ 126	.03
22	461,448	—5082	1.09
23	466,248	— 282	.06
24	465,314	—1216	.26

APPENDIX C



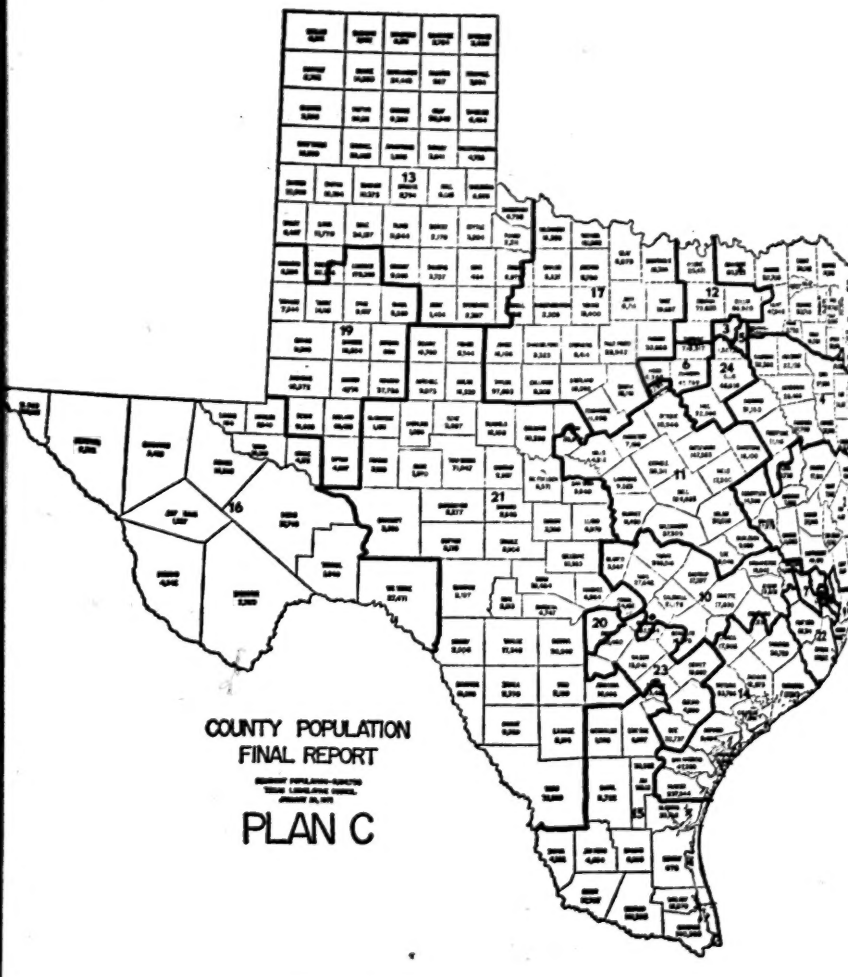
PLAN B

POPULATION VARIATIONS FROM "IDEAL" DISTRICT

[from the Amended Complaint]

District	Population	Differences (±)
1	466,545	+ 15
2	466,565	+ 35
3	466,266	—264
4	466,234	—296
5	466,620	+ 90
6	466,285	—245
7	466,336	—194
8	466,704	+174
9	466,678	+148
10	466,313	—217
11	466,258	—272
12	466,930	+400
13	466,663	+133
14	466,437	— 93
15	466,359	—171
16	466,663	+133
17	466,432	— 98
18	466,520	— 10
19	466,649	+119
20	466,514	— 16
21	466,753	+223
22	466,707	+177
23	466,424	—106
24	466,875	+345

APPENDIX D



PLAN C:

POPULATION VARIATIONS FROM "IDEAL" DISTRICT

[from the Amended Compaint]

District	Population	Differences (±)
1	465,986	—544
2	466,817	+287
3	466,835	+305
4	467,108	+578
5	466,258	—272
6	467,023	+493
7	466,336	—194
8	466,704	+174
9	466,678	+148
10	466,303	—227
11	466,569	+ 39
12	466,926	+396
13	467,173	+648
14	466,437	— 93
15	466,359	—171
16	465,941	—589
17	466,340	—190
18	466,520	— 10
19	466,154	—376
20	466,654	+124
21	466,875	+345
22	466,707	+177
23	466,167	—363
24	465,855	—675

APPENDIX E

Ranking of States by Deviation of State Ideal District from National Ideal District

(202,428,262 ÷ 435 = 465,352)

State	Number of Districts	"Ideal" District	Deviation from National "Ideal" District	Percent Varia
1. Alaska	1	302,173	—163,179	35.0
2. Wyoming	1	332,416	—132,936	28.5
3. South Dakota	2	333,129	—132,223	28.4
4. Montana	2	347,205	—118,147	25.3
5. Idaho	2	356,504	—108,848	23.3
6. New Hampshire	2	368,841	— 96,511	20.7
7. Hawaii	2	384,957	— 80,395	17.2
8. Oklahoma	6	426,542	— 38,810	8.3
9. South Carolina	6	431,753	— 33,599	7.2
10. West Virginia	4	436,059	— 29,293	6.2
11. Colorado	5	440,852	— 24,500	5.2
12. Arizona	4	443,121	— 22,231	4.7
13. Mississippi	5	443,382	— 21,970	4.7
14. Vermont	1	444,732	— 20,620	4.4
15. Kansas	5	449,814	— 15,538	3.3
16. Florida	15	452,630	— 12,722	2.7
17. Louisiana	8	455,398	— 9,954	2.1
18. Georgia	10	458,958	— 6,394	1.3
19. Kentucky	7	459,902	— 5,450	1.1
20. North Carolina	11	462,005	— 3,347	0.7
21. Illinois	24	463,082	— 2,270	0.4
22. Ohio	23	463,131	— 2,221	0.4
23. California	43	464,026	— 1,326	0.2
24. Virginia	10	464,849	— 503	0.1
25. New York	39	466,429	1,077	.2
26. Texas	24	466,530	1,178	.2
27. Michigan	19	467,110	1,758	.3
28. Missouri	10	467,740	2,388	.5

State	Number of Districts	"Ideal" District	Deviation from National "Ideal" District	Percentage Variation
Iowa	6	470,840	5,488	1.18
Pennsylvania	25	471,756	6,404	1.38
Indiana	11	472,152	6,800	1.46
Massachusetts	12	474,098	8,746	1.88
Rhode Island	2	474,862	9,510	2.04
Minnesota	8	475,634	10,282	2.21
New Jersey	15	477,878	12,526	2.69
Arkansas	4	480,824	15,472	3.32
Washington	7	487,024	21,672	4.66
Nevada	1	488,738	23,386	5.03
Maryland	8	490,300	24,948	5.36
Tennessee	8	490,521	25,169	5.41
Wisconsin	9	490,881	25,529	5.49
Alabama	7	492,024	26,672	5.73
Nebraska	3	494,597	29,245	6.28
Maine	2	496,832	31,480	6.76
Connecticut	6	505,370	40,018	8.60
New Mexico	2	508,000	42,648	9.16
Oregon	4	522,846	57,494	12.35
Utah	2	529,637	64,285	13.81
Delaware	1	548,104	82,752	17.78
North Dakota	1	617,761	152,409	32.75

APPENDIX F

Table of Proportions of Population 18 Years Old and Over Texas Congressional Districts, 1960

Texas Congressional District	Population 18 and Over	Total Population	Percentage 18 and Over
1	159,140	245,942	64.71
2	257,339	420,402	61.69
3	189,351	293,942	64.42
4	146,008	216,371	67.48
5	603,661	951,527	63.44
6	164,198	248,149	66.17
7	174,994	265,629	65.88
8	339,549	568,193	59.76
9	305,552	498,775	61.26
10	230,692	353,454	65.27
11	211,448	322,484	65.57
12	340,091	538,495	63.16
13	216,678	326,781	66.31
14	310,453	539,262	57.57
15	276,131	515,716	53.54
16	331,801	573,438	57.86
17	191,235	287,889	66.43
18	225,430	363,596	62.00
19	253,985	424,774	59.79
20	413,899	687,151	60.23
21	172,275	262,742	65.57
22	427,111	674,965	63.28
State	5,941,021	9,579,677	62.02

Range—53.54 — 67.48 = 13.94%

(Source: U. S. Bureau of the Census, Congressional District Data Book, (Districts of the 88th Congress), Washington (1963) pp. 483-4, 492-3.)

APPENDIX G

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-5202-D
(Three Judge Court)

DAN WEISER, ET AL.,
Plaintiffs

v.

THE HONORABLE BOB BULLOCK,
SECRETARY OF STATE OF THE STATE
OF TEXAS,
Defendant

[filed March 21, 1972]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Bob Bullock, Secretary of State of the State of Texas, the Defendant above named, acting by and through Crawford C. Martin, Attorney General of Texas, hereby appeals to the Supreme Court of the United States from the Final Judgment of Injunction entered by the United States District Court for the Northern District of Texas, Dallas

Division, on January 22, 1972, Civil Action No. CA-3-5202-D.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

SAMUEL D. MCDANIEL
Staff Legal Assistant

Attorneys for Bob Bullock,
Secretary of State of the State
of Texas, Defendant
P. O. Box 12548, Capitol Station
Austin, Texas 78711

PROOF OF SERVICE

I, Samuel D. McDaniel, one of the attorneys for Bob Bullock, Secretary of State of the State of Texas, Defendant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of March, 1972, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On Plaintiffs, Dan Weiser, Donald Coleman, John L. Edwards, Hugh Elliott, John W. Fletcher, John R. Karr, Joyce V. Karr, Benjamin Newcomb, Norma Palmer, Marvin Zimet, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to their attorneys of record, Lawrence Fischman and David H. Rosenberg, Fischman, Rosenberg, Kasmir & Preston, 601 Kirby Building, 1509 Main Street, Dallas, Texas 75201.

2. On Intervenors, by mailing a copy in a duly addressed envelope, with air mail postage pre-

paid, to their attorney of record, Nathan Eason, 400 Alamo National Building, San Antonio, Texas 78205.

3. On Amicus Curiae, Senator Lloyd M. Bentsen, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to his attorney of record, Charles L. Black, Jr., 169 Bishop Street, New Haven, Connecticut 06511.

SAMUEL D. MCDANIEL
Staff Legal Assistant
P. O. Box 12548, Capitol Station
Austin, Texas 78711

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-5202-D
(Three Judge Court)

DAN WEISER, ET AL.,

Plaintiffs

v.

THE HONORABLE BOB BULLOCK, SECRETARY OF STATE OF THE STATE OF TEXAS,

Defendant

[filed March 21, 1972]

DESIGNATION AND CERTIFICATION OF RECORD

The Clerk of the United States District Court for the Northern District of Texas, Dallas Division, is hereby requested to prepare and certify a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States in accordance with Rule 12 of the Rules of the United States Supreme Court.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
SAMUEL D. MCDANIEL
Staff Legal Assistant
Attorneys for Bob Bullock,
Secretary of State of the State
of Texas, Defendant
P. O. Box 12548, Capitol Station
Austin, Texas 78711

SEP 9 1972

MICHAEL RODAK JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-1623

BOB BULLOCK, SECRETARY OF STATE OF TEXAS,

Appellant

v.

DAN WEISER, DONALD COLEMAN, JOHN L. EDWARDS, HUGH ELLIOT, JOHN W. FLETCHER, JOHN R. KARR, JOYCE V. KARR, BENJAMIN NEWCOMB, NORMA PALMER AND MARVIN ZIMET,

Appellees

APPELLANT'S REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas
SAMUEL D. McDANIEL
Staff Legal Assistant
JAMES QUICK
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711
CHARLES L. BLACK, JR.
169 Bishop Street
New Haven, Connecticut 06511

September 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-1623

BOB BULLOCK, SECRETARY OF STATE OF TEXAS,

Appellant

v.

DAN WEISER, DONALD COLEMAN, JOHN L. EDWARDS, HUGH ELLIOT, JOHN W. FLETCHER, JOHN R. KARR, JOYCE V. KARR, BENJAMIN NEWCOMB, NORMA PALMER AND MARVIN ZIMET,

Appellees

APPELLANT'S REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellant will herein make brief reply to certain portions of appellees' Motion to Dismiss or Affirm. These points of reply will be numbered as appellees have numbered their Points in their Section entitled "Argument and Authorities".

(1)

Of the twelve points appellees refer to as "incontrovertibly established" (Motion to Dismiss or Affirm, pp. 2-5), Numbers (2), (3), (6), (7), (10), (11) and (12) are so evidently innocuous that appellant is entirely at a loss to know why they are set forth. Number

(1), p. 3, raises difficult questions of law and fact, not suitable for discussion at this time, such as the question whether a possible mistake of law on the part of some legislator or legislators, whether or not shown to have been acted on, vitiates this bill; appellant concedes nothing as to this point number (1). Points (4) and (5) raise issues of fact and very important issues of law never decided by this Court: *Ely v. Klahr*, 403 U.S. 108 (1971), relied on by appellees, carefully signals reservation of these extremely important issues: see 403 U.S. at 112, n. 5; it should be pointed out again, moreover, that there is no showing in this Record of any casual connection between concern for constituency-incumbent relations and any population variancy. As to points number (8) and (9), they are significant only if *any* rejection of *any* lower-deviation bill *ipso facto* voids the bill adopted; only this Court, after full consideration, can say whether such a mechanical and Draconic rule is the law. (It is to be noted here that, after explicitly disclaiming reliance on the claim of a 4.9% variation in the Legislature's bill (Transcript of Argument in the District Court, pp. 10-11), the appellees reintroduce this figure: see Motion to Dismiss or Affirm, p. 4, n. 1).

The short of the matter at this time is this: Senate Bill One, invalidated by the court below on mere citation of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), shows an average variation from "ideal" of .745%, a maximum up-and-down variation of 4.1%, and a largest-to-smallest district ratio of 1:1.04. If as tight a fit as that is to be held *per se* void *solely* on the authority of *Kirkpatrick*—a case whose Record and Findings of Fact established definite and conscious intent to maximize rural over-representation—then it ought to be this Court that says so, after full consideration of so grave a step.

(2)

Appellees' second heading promises by its caption to answer appellant's contention that the *Kirkpatrick* rule ought to be receded from. But nothing in the body of the argument meets or even purports to meet any of the arguments made in appellant's Jurisdictional Statement, as a quick eye-comparison will easily show.

Quite surprisingly, appellees say, in this last paragraph under this Point:

> "*The debasement of the vote is of secondary importance.* It is the calculated, foreseeable consequence of ". . . the approach to redistricting . ." which, under all the evidence was (1) to protect incumbents (the "incumbency factor"; or euphemistically, "maintenance of constituency — congressman relations"); (2) to choose who among them would be elected to fill a vacancy; and (3) to preserve geo-political lines." Motion to Dismiss or Affirm, p. 9. [Emphasis supplied]

This paragraph foreshadows an entirely new theory —one that cries out for examination in this Court. This lawsuit—having been brought, pleaded, briefed and argued on a theory of "debasement of the vote" *and on that theory alone*—seems to be turning into something else. Appellant will not try to sketch what that something else may be, but submits that there could be no question more evidently substantial than the question whether we have come from *Baker v. Carr*, 369 U.S. 186 (1962) to a point where "debasement of the vote" is not even of primary importance.

(3)

As to their Point (3), appellees are in a most difficult position. At the trial and argument below, Plan C, the one adopted by the District Court, was never mentioned by them, nor is there a scintilla of evidence in

the whole Record bearing on the desirability of Plan C. At the trial and argument, on the other hand, appellees several times recommended the adoption of their Plan B, recommending it *precisely because* it rather closely followed the Legislature's Plan. (*Transcript*, pp. 25, 27, 39, 79)

Now appellees defend Plan C, seemingly on the ground that it does *not* follow the Legislature's judgments as closely as possible, but departs from them radically:

> "*This faithful adherence to the Legislative intent may well have been the vice* that precluded the adoption of Plan B, even conditionally; and compelled the Court to conclude . . . "that Plan C best effectuates the principal of 'one man, one vote' enunciated by the Supreme Court." Motion to Dismiss or Affirm, p. 10. [Emphasis supplied]

If faithful adherence to the Legislature's intent has become a *vice*, to be avoided even when population equality—the *only* constitutional value hitherto enunciated—is not thereby served, we have somehow entered a very new world, wherein we need the most authoritative guidance.

CONCLUSION

Appellees' Motion in no way meets appellant's contentions. Instead, in the respects indicated, it constitutes an additional demonstration of the need for a searching examination in this Court of the theoretical progression which has unanticipatedly led to the application of so drastic a remedy as the one administered in this case, to redress "injuries" which no one can really believe are injurious to any person or class.

Respectfully submitted:

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